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BIS Outlines Five New Final Rules at Update Conference

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While the Bureau of Industry and Security (BIS) annual update conference is always a closely watched event for trade pros, this year's Sept. 30-Oct. 2 conference in Washington, D.C., pulled out all the stops in terms of announcing multiple new rules and regulations.

Although BIS is still awaiting reauthorization of the long-expired Export Administration Act, it hasn't prevented the agency from aggressively advancing the Bush administration export control regulatory directives announced January 22, 2008.

As Assistant Secretary for Export Administration Christopher Wall put it in his opening address to the conference, "Over the last months, we have been working hard to finalize a number of regulations, which are designed to target more precisely the threats we face, to ensure proper levels of control for continued U.S. economic competitiveness and innovation while protecting national security and to improve the efficiency and transparency of the export licensing process."

Five New Rules

To that end, BIS published no less than five new rules in the Federal Register in the days leading up to, during, and immediately following Update 2008. Summaries of each of these rules—all critical to trade compliance—follow.

1) De Minimis U.S. Content in Foreign-Made Items

This rule was published in the Federal Register Oct. 1, 2008, effective on that date, although comments from the trade will be accepted until Dec. 1, 2008.

To view the full text, visit <http://edocket.access.gpo.gov/2008/pdf/E8-23142.pdf>. This interim final rule revises the sections of the Export Administration Regulations (EAR) that cover foreign-made items that incorporate controlled U.S.-origin items (known as the EAR de minimis rules).

These are the first revisions to the de minimis rules since 1996. De minimis rules are critical to non-U.S. companies since they determine whether a foreign-made item incorporating controlled items that are U.S.-origin are subject to U.S. export controls.

As summarized by Wall, "this regulation modifies EAR Section 734.4, which required separate calculations for hardware and software incorporated in foreign manufactured end products." He noted, "In the global market, products are often manufactured with embedded software, and it is impossible to disentangle the value of each and unrealistic to control the two separately."

Wall stated that the rule is intended to reflect actual global market realities in regard to re-exports—a change trade groups have long lobbied for.

The rule:

alters the de minimis calculation for foreign-produced hardware bundled with software that is of U.S. origin;

eliminates the requirement that a onetime report be submitted to BIS for foreignmade software incorporating software of U.S. origin;

clarifies the definition of “incorporate” as applied to both the de minimis rules and medical statement of understanding;

revises the “Steps for Using the EAR” and General Prohibition 2 to reduce redundancies in the EAR and harmonize its provisions with the other revisions made in this rule.

2) Encryption Simplification

This rule was published Oct. 3 and became effective on that date (for the Federal Register text, visit edocket.access.gpo.gov/2008/pdf/E8-23201.pdf). The rule amends the EAR to:

- 1) make treatment of encryption items more consistent with other EAR items; and
- 2) simplify the regulations in regard to encryption.

Specifically, the rule streamlines the requirements of License Exception ENC, eliminates notifications for ECCN 5D992 software, permits self-classification for low-level encryption items without review, and adds several ENC-eligible countries (Bulgaria, Canada, Iceland, Romania, and Turkey).

At Update 2008, Wall stressed that this regulation is only the beginning: “These are not fundamental reforms, but they are a start.” Challenges still to be addressed, he told attendees, are “issues related to open cryptographic interface requirements, reporting of exports under License Exception ENC, national security controls on TSU-eligible encryption source code, and controls on chips and other encryption components and technology for mass-market products.”

Some license exceptions and notification requirements are also eliminated under the rule, while certain parameters are adjusted to reflect technological advances.

The rule also adds two new review and reporting requirement exclusion paragraphs under License Exception ENC for wireless “personal area network” items and for “ancillary cryptography” items.

3) Intracompany License Exception

Published in the Federal Register Oct. 3, the comment deadline for this proposed rule is Nov. 17, 2008 (for the full text, visit <http://edocket.access.gpo.gov/2008/pdf/E8-23506.pdf>). The proposed rule would amend the EAR by creating a new license exception, “intracompany transfer (ICT),” to allow an approved parent company and its approved wholly owned or controlled-in-fact entities to export, re-export, or transfer (in-country) many items on the Commerce Control List (CCL) among themselves for internal company use.

To utilize this license exception, companies would have to apply for BIS authorization. Wall explained at the Update conference that the new license exception “will authorize companies with demonstrably effective internal compliance systems to ship—within their corporate families—a wide range of products and technology for their internal use.” He pointed out, “For companies with global R&D and manufacturing operations, this authorization should greatly simplify dealing with licensing issues, including deemed exports, that arise in connection with their internal operations.”

The rule outlines the criteria companies must follow to be eligible to use license exception ICT and the procedure to apply for authorization, as well as listing countries in which eligible applicants must be incorporated (or have their principal place of business) to use this license exception.

4) EAR Revisions Based on Review of CCL

This final rule was published Oct. 6, 2008, effective on that date (for the full text, visit <http://edocket.access.gpo.gov/2008/pdf/E8-23289.pdf>). The rule revises the EAR based on a systematic BIS review of the Commerce Control List (CCL). The goal was to clarify and rationalize existing controls, eliminate redundant and out-of-date controls, and add new controls where required for consistency with international regimes.

The rule constitutes the second phase of an ongoing BIS review of the CCL. The first phase was published on April 18, 2008 of the rule, "Technical Corrections to the Export Administration Regulations Based on a Systematic Review of the CCL" (for the Federal Register text, visit <http://edocket.access.gpo.gov/2008/E8-8302.htm>). The first phase focused on necessary technical corrections and clarifications to the CCL.

The new rule substantively revises both the EAR and the CCL.

BIS has also provided additional Web guidance to provide greater clarity to exporters and re-exporters regarding existing provisions of the CCL. All trade pros whose companies export items on the CCL should review the rule immediately to determine whether their ECCNs have been modified by it.

5) Wassenaar Agreement Implementation

This 164-page final rule can be viewed at www.bis.doc.gov/pdf/wassenaar_plenary.pdf. The rule revises the CCL and EAR to implement Wassenaar List revisions agreed on at the December 2007 Wassenaar Arrangement (multilateral arms agreement) Plenary Meeting. The rule also adds and expands unilateral U.S. export controls and national security export controls on certain items to harmonize them with the amendments made to implement the Wassenaar

Arrangement decisions

The rule amends certain entries controlled for national security reasons in the CCL, adds new entries to the CCL, and amends and adds EAR definitions. Trade pros whose companies export any CCL items should review the rule to see whether their ECCNs are affected.

Entity List Additions

On Sept. 22, 2008, BIS published the Entity List Regulation Initiative in the Federal Register, effective on that date (www.access.gpo.gov/bis/ear/pdf/744spir.pdf). At Update 2008, Wall described the BIS criteria for designation or removal from the list, stating that "the entity list provides a new, more flexible tool to use in establishing a licensing requirement for products or technology that otherwise would not be controlled for entities that have been found, based on specific and articulable facts, to be acting contrary to the national security or foreign policy interests of the United States."

Update Enforcement Panel

The update conference also featured an export enforcement session led by Daryl Jackson, assistant secretary for export enforcement. Jackson told attendees he expects to see higher penalties as a result of the Justice Department's Export Enforcement Initiative and higher administrative penalties as a result of the International Emergency Economic Powers Enhancement Act (IEEPA).

The enforcement panel following Jackson's presentation provided the following data on export enforcement during the first three quarters of fiscal year 2008:

Criminal cases: 16 arrests, 46 indictments and informations, 32 convictions, \$1,267,500 in fines.

Administrative cases: 33 cases closed with final orders, penalties imposed in 27 of the 33 cases, civil fines totaling \$2,342,132.

Voluntary self-disclosures (VSDs): 145 received (projected to be 193 for FY 2008), 42 of the 145 VSDs were investigated and closed (20 without action, 21 with warning letters, one with charging letter), 103 of the 145 VSDs remain under investigation.

End-use checks: 352 EUCs; 35 percent were prelicense checks and 65 percent were post-shipment verifications, approximately 16 percent of all EUCs were unfavorable, reviewed almost 7,000 parties, completed checks in 48 countries.

For More Update 2008 Information

As a new BIS service, for the first time many of the update sessions were recorded and will be available for video viewing on the BIS Web site (www.bis.doc.gov). BIS estimates the videos from Update 2008 will be available well before the end of the year.